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Behind The Process: Remembering John Ely's Compassion

CLARK FRESHMAN*

I never imagined I'd ever think of John Hart Ely as one of my best friends and one of the best beings I've ever known. I say *beings* rather than *people* advisedly — John was, as I discovered to my surprise, a real friend to all animals, human and non-human alike. It's worth exploring why this comes as so much of a surprise, much as why so many took so long to glimpse so much of the John I came to admire and love so much.

John knew this. He spoke many times of a certain Con Law exam he gave at Stanford. The question: How does the Constitution apply to a state statute criminalizing relations between consenting but unmarried adults — the kind of so called-fornication statute once popular in many states? Many students came back with the answer John expected, and might have considered himself: There's no right to have any kind of sex one wants in the Constitution, and arguments against such laws should go to the legislature.¹ But there were apparently some Scalia wannabes in the class, too: They attacked the kind of people who lived together outside marriage, many calling them immoral, some calling them, and perhaps even their children, bad names.²

John would pause at this point in the story and say, "And I was still

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1. I say John would have "considered" such an argument based on his famous attack on the privacy and autonomy rights the court found in *Roe v. Wade*. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). But no doubt he would have considered others as well, such as the way that unpopular sexual minorities may lack access to the political process as his friend and colleague at Stanford, Janet Halley, argued so well. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 930-32 (1989).

2. On the gratuitous cruelty of Scalia, see, of many examples, *Lawrence v. Texas*, 123 S. Ct. 2472, 2495 (2003) (Scalia, J., dissenting) ("The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable,' the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.") (internal citations omitted).

living with the same woman out of wedlock for some years when they wrote this!"

Easy to laugh at such assumptions about John's personal life³ — except my own assumptions, really my own stereotypes. I spent three of the happiest years of my life at Stanford Law School, a few years after John had been its famous dean. Everyone seemed so approachable, so interested and interesting. I learned in the classrooms and chatting with professors in the beautiful outdoor areas, much like Miami's but without the humidity. But I never spoke to John nor took a single class with him. I'd heard things here and there — heard how he "opposed abortion rights," or didn't care about women, as one friend who stormed out of his Con Law class told me. And he wore a jacket when the rest of professors wore shirts; he stood up perfectly straight and others . . . , well, this was California after all. And he taught National Security Law, which I *knew* must have been some kind of craven defense of national secrecy and all of that. (I don't remember if I consciously thought that must have meant some kind of homophobia or not.) I was wrong. If I'd only bothered to ask more, or look more, I'd have noticed: John's shoes were canvas, perhaps not to have wasted the lives of animals, his national security law class criticized the paranoia and secrecy of defense, and so on.

* * *

I finally met John here at Miami eight years ago, and only by mistake. My door was open, and he started talking to me about animal rights. It might have been the first of many times he asked about co-teaching a class on animal rights. It was odd enough this was coming from *John Hart Ely*. It was odder he was telling *me* — that was hardly *my* issue at the time. And then Gerry (my romantic partner of several years) came in, and I got it. Gerry had put up these animal rights posters all over the office we shared, and John assumed not unreasonably they were mine.

Gerry and John stayed good friends. Gerry loves collecting replicas of planes, and John had some from his days as general counsel for the Federal Aviation Administration. On one of Gerry's birthdays, John gave him the replica of the Concorde that John received from the British after the FAA approved the Concorde's landing in the United States. It was so like John, not merely considerate of his friends but thoughtful in what would interest them, be it a gift, a note with an interesting article, or one of his favorite cartoons. (Much of the humor was of the *New*

3. I always heard this as the students' being ignorant of John's personal life. Could they have known the situation and assumed John would be flattered that people would consider his arguments, even when it would mean reciting condemnations of John himself?

Yorker cartoon category, but my favorite was a student evaluation of his Con Law class at UM: In response to the question whether the materials were appropriate, the student scrawled in giant letters, "WAS THIS CON LAW?" Apparently not all students were as intimidated as I!)

John's "friends" category eventually came to include many on the Miami faculty. He would often say, "I was driving back from the Keys when I saw the sign for UM, and I thought, 'If I taught there, I'd be home now.' But it really has a *very* good faculty, I found out." I always smiled when John said that — it wasn't until years later I remembered I wasn't on the faculty when he decided to come.

And still it seemed, especially in his earliest times at Miami, that many might have kept some distance from John, perhaps held back as well by stereotyping. Perhaps people saw his office from a distance with the imposing antique desk Stanford let him use after his deanship — and never stepped inside to see the absurdist details like the sculpture of a head with stereo headphones John had slipped on it. Since I came to lunch with John often and hung out in his office, people would sometimes ask, in almost whispered voices, "Is he happy?" as if he were some royal of whom one could not directly ask questions.

It's easy enough to laugh at some of the stereotypes of John because they seem so harmless — they didn't keep his wife, Gisela, from meeting him and falling so much in love. And, for those of my colleagues who kept their distance, perhaps I'm wrong, there being so many reasons why people do and don't meet. But these stereotypes and self-stereotypes may have cost John and all of us quite dearly.

* * *

I'm remembering the last weeks of John's life: Gisela, his son Bob, my partner Gerry and I gathered in his hospital room. John had been talking some, sitting up some; he'd walk a bit with help down the hallway. And then it would come out of nowhere: that horrible sound — a scream really, not quite of pain, nor of sadness, but like some imitation of what a scream might be like. Bob and Gisela looked less fazed — Bob told me it happened often and then stopped. And John would tell the story, one he'd tell so many times. "I wish I could cry," he'd say. His mother had raised him alone, he'd say. One day she found him crying. She dragged him into the bathroom, and made him look in the mirror. "Do you see those," she'd yell, "those are tears. Men don't cry." But he did the scream, the scream of something. I remember Bob telling him many times, "It's okay to cry, it's okay." I never saw John cry, nor heard that he did, but he seemed quite comfortable when those around him did. Still there'd be those terrible screams.

I remember only one other time I'd heard it. I told him how Gerry

had found this suffering animal someone had horribly abused⁴ — I'd barely told the story, and John lifted his hands, closed his eyes, and let out the horrible sound. John might have some believe that his concern with animals was a simple utilitarian calculus, no emotions allowed, much like the image the mother he describes⁵ would have wanted. But that wasn't John. I remember many a conversation about some career or personal decision that gripped me at the time. One might have expected John to break out some decision analysis and some formal process, something he might have mustered with his schooling in philosophy. (He'd been encouraged to teach philosophy as a Princeton undergraduate.) But his advice was always the same: For the big decisions, you can weigh pros and cons but ultimately "go with your instinct."

I wonder, too, whether John's carriage as the Strong Man affected his last years in other ways. He told me once he asked for a physical, and the doctor asked, "Well, I've run so many tests, what would you like me to do?" Perhaps John ran against the other side of the stereotype of the Wise Old Man (or the Elder Statesman as the psychological literature puts it);⁶ everyone assumed he would know what to do, even about what tests to run on himself.

I wonder how many others missed out on John because of such images. And I wonder, too, how many of us miss out on others because we only see the Tough or Wise or Grumpy or whatever old man.⁷ Two

4. At your own risk, for more details, see Clark Freshman, *Whatever Happened To Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 439 n.500 (2000).

5. I say "John describes" not because I knew his mother or have any reason to doubt anything John said — he was more prone to underplay than overplay in describing things we'd both seen. Rather, I worry much that our American culture, indeed much of our Western culture, has such pervasive ambivalence about mothers. See Clark Freshman, *Re-Visioning the Dependency Crisis and the Negotiator's Dilemma: Reflections On the Sexual Family and the Mother-Child Dyad*, 22 LAW & SOC. INQUIRY 97, 103 (1997).

6. See Amy J.C. Cuddy, *Doddering but Dear*, in AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS, 1, 13 (Todd D. Nelson ed., 2002) (describing the many subtypes of elder people, including the "elder statesman [who] is agentic but socially insensitive (e.g., aggressive and intolerant), reflecting feelings of respect and mirroring the content but not warm category").

7. I hesitate to comment on general points of law or theory on this occasion. Perhaps some would think John the scholar would have wanted even his death to be an occasion for such thoughts, but I have wanted my own contribution here to be about John the compassionate being. And yet important points of both law and theory remain: There are those now who question whether older persons really need protection. Some even otherwise quite empathetic and thoughtful writers suggest older people face no lack of sympathy because we will all be older some day. See, e.g., David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 58 n.4 ("Age discrimination is fundamentally different from other types of discrimination since aging is something that occurs for all of us."). But, as I've written at greater length elsewhere, that doesn't ring true either to my own experiences or the teachings of much of

weeks before John died, the very day before my own father died, I spent hours waiting for John to wake up at his house. John talked a bit. He seemed more content, especially when Bob broke out the pipe John liked so much.

My own father hadn't said a word for weeks. But I'd spent many of the last eight months visiting with him at my childhood home, then the hospitals, and the nursing home, and the hospice. I don't think I'd have done that without John and a few of the men older than I.⁸ I'd known my own father much as students knew Ely — he'd often been stern, working so long in this or that Defense Department position. (Only a few years before he died, I mentioned an issue in advising the honor council and discovered for the first time he investigated honor code violations for the Air Force Academy.) Many people told me, lectured me really, about how much I should forgive this or that he'd done, and they were some pretty awful things. But it was through John, and some rather different meditation practices, too, that I came to accept my father. (John, too, had toyed with the TM version of meditation — as ever the fast learner, he turned down an opportunity to teach that, too.)⁹ John showed me how much compassion there was behind so intimidating and impressive a front. No doubt people will remember John's work, some of it being the most widely cited of any legal work,¹⁰ but I hope some will remember John, and all the other Johns out there, all those seemingly tough, seemingly cold, often men, and often older . . . remember how much more there can be than just a type.

I miss John very much.

the psychology of how we view others: "The younger 'we' of today may simply have no empathy with the old 'we' of tomorrow." Freshman, *supra* note 4, at 437 n.490.

8. I mentioned some names in an earlier draft, but those who saw their names were surprised to see the "older" so close to their own names. And as I thought more about how many now fit the category (male faculty, older than I, and now friends), the list quickly began to resemble every other male member of the Miami faculty.

9. Some like to distinguish between different kinds of contemplative practices or meditation, but many offer similar benefits even as they follow somewhat different paths. Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67 (2002).

10. See, e.g., Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 J. LEGAL STUD. 397, 401 (2000).